

United States Senate
WASHINGTON, DC 20510-4904

January 30, 2006

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Gonzales:

I am writing to let you know in advance about some of the questions I intend to ask you about when you testify at the Senate Judiciary Committee's February 6 hearing on "Wartime Executive Power and the NSA's Surveillance Authority." I ask that you be prepared to discuss these issues.

I am particularly interested in asking about your misleading testimony at your confirmation hearing on January 6, 2005, when I specifically asked you if the President has the authority to authorize warrantless wiretaps in violation of statutory prohibitions. As the attached transcript shows, you initially tried to dismiss my question as "hypothetical." After further questioning, you said the following:

Judge Gonzales. Senator, this President is not – it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

Senator Feingold. Finally, will you commit to notify Congress if the President makes this type of decision and not wait 2 years until a memo is leaked about it?

Judge Gonzales. I will commit to advise the Congress as soon as I reasonably can, yes, sir.

In light of recent revelations that the President specifically authorized wiretapping of Americans in violation of the Foreign Intelligence Surveillance Act, and did so years prior to your confirmation hearing at a time when you were White House Counsel, I find this testimony misleading, and deeply troubling. I will expect a full explanation at the hearing.

There are a number of additional topics I may ask about at the hearing, including the following:

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(1) The legal standard that the government has used to decide whose telephone calls and emails to intercept within the United States under the NSA program, how that standard compares to the FISA standard, who has been making those determinations, and what oversight and training the Department has provided those individuals on the legal requirements of the program, if any.

(2) The contemporaneous legal advice provided by the Justice Department, or by you as White House Counsel, throughout the course of the program, and how it may differ from the Administration's current legal justifications. Please note that it is extremely important that you provide any contemporaneous, written, legal analyses in advance of the hearing, as requested by Senator Leahy and others.

(3) The limits, if any, to the Administration's legal theory that the President has the authority either under the Authorization for the Use of Military Force or as Commander in Chief to violate criminal laws of the United States. What other statutes or treaties are being or might be violated under this legal theory? Would this legal theory permit surveillance of communications by U.S. citizens solely within the United States or the assassination of U.S. citizens within the United States? If not, why not?

Thank you for your attention to these matters.

Sincerely,



Russell D. Feingold
United States Senator

Attachment

Excerpt from Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States, Senate Judiciary Committee, January 6, 2005, Serial No. J-109-1, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:99932.wais

Senator Feingold. Let me switch to a subject that has come up a lot here today. In the August 2002 memorandum, the Justice Department concludes that the President, as Commander in Chief, may authorize interrogations that violate the criminal laws prohibiting torture and that the Congress may not constitutionally outlaw such activity when it is authorized by the President. This is the claim, essentially, that the President is above the law so long as he is acting in the interest of national security.

A December 30 rewrite of the August memorandum does not repudiate this view. It simply says the issue is irrelevant because the President has prohibited torture.

Today, in response to questions on this subject, you have been unwilling to repudiate this legal theory. You have danced around the question a bit. But as I understand your answers so far, you have said there may be a situation where the President would believe a statute is unconstitutional and would therefore refuse to comply with it, but would abide by a court's decision on its constitutionality. You, also, I am told, said that many Presidents have asserted the power not to enforce a statute that they believe is unconstitutional. But there is a difference between a President deciding not to enforce a statute which he thinks is unconstitutional and a President claiming to authorize individuals to break the law by torturing individuals or taking other illegal actions.

So what I want to do is press you on that because I think perhaps you have misunderstood the question, and it is an important one. It goes to a very basic principle of the country that no one, not even the President of the United States, is above the law. Of course, the President is entitled to assert that an Act of Congress is unconstitutional.

This President did so, for example, with respect to some portions of our McCain-Feingold bill when he signed it, but his Justice Department defended the law in court, as it is bound to do with every law duly enacted by the Congress. And his campaign and his party complied with the law while a court challenge was pending. No one asserted that the President had the power to ignore a law that he thought was unconstitutional.

The question here is what is your view regarding the President's constitutional authority to authorize violations of the criminal law, duly enacted statutes that may have been on the books for many years when acting as Commander in Chief? Does he have such authority? The question you have been asked is not about a hypothetical statute in the future that the President might think is unconstitutional. It is about our laws in international treaty obligations concerning torture. The torture memo answered that question in the affirmative, and my colleagues and I would like your answer on that today.

I, also, would like you to answer this: does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans' homes and wiretaps of their conversations in violation of the criminal and foreign intelligence surveillance statutes of this country?

Judge Gonzales. Senator, the August 30th memo has been withdrawn. It has been rejected, including that section regarding the Commander in Chief's authority to ignore the criminal statutes. So it has been rejected by the executive branch. I, categorically, reject it. And, in addition to that, as I have said repeatedly today, this administration does not engage in torture and will not condone torture. And so what we are really discussing is a hypothetical situation that—

Senator Feingold. Judge Gonzales, I have asked a broader question. I am asking whether, in general, the President has the constitutional authority, at least in theory, to authorize violations of criminal law when there are duly enacted statutes simply because he is Commander in Chief? Does he have that power?

Judge Gonzales. Senator, in my judgment, you have phrased sort of a hypothetical situation. I would have to know what is the national interest that the President may have to consider. What I am saying is it is impossible to me, based upon the questions you have presented to me, to answer that question. I can say that there is a presumption of constitutionality with respect to any statute passed by Congress. I will take an oath to defend the statutes. And to the extent that there is a decision made to ignore a statute, I consider that a very significant decision and one that I would personally be involved with, I commit to you on that, and one I will take with a great deal of care and seriousness.

Senator Feingold. Well, that sounds to me like the President still remains above the law.

Judge Gonzales. No, sir.

Senator Feingold. If this is something where you take a good look at it, you give a presumption that the President ought to follow the law, you know, to me that is not good enough under our system of Government.

Judge Gonzales. Senator, if I might respond to that, the President is not above the law. Of course, he is not above the law. But he has an obligation, too. He takes an oath as well. And if Congress passes a law that is unconstitutional, there is a practice and a tradition recognized by Presidents of both parties that he may elect to decide not to enforce that law. Now, I think that that would be—

Senator Feingold. I recognize that and I tried to make that distinction, Judge, between electing not to enforce as opposed to affirmatively telling people they can do certain things in contravention of the law.

Judge Gonzales. Senator, this President is not – it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

Senator Feingold. Finally, will you commit to notify Congress if the President makes this type of decision and not wait 2 years until a memo is leaked about it?

Judge Gonzales. I will commit to advise the Congress as soon as I reasonably can, yes, sir.

Senator Feingold. Well, I hope that would be a very brief period of time, and I thank you again, Judge Gonzales.